UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ZHAOYIN WANG Plaintiff, v. BETA PHARMA, INC., DON ZHANG, AND ZHEJIANG BETA PHARMA CO., LTD., Defendants.	Civil Action No. 3:14-cv-01790-VLB August 4, 2015

PLAINTIFF'S SURREPLY MEMORANDUM RE SUBJECT MATTER JURISDICTION

Defendant's "Reply Memorandum of Law in Further Response to Order to Show Cause," Docket Entry 91, (hereafter, "Reply Memorandum") misrepresents the law applicable to the decision on this Court's Order to Show Cause. The circumstances demonstrate that the misrepresentation is deliberate, made for the purpose of advancing factual arguments that are dependent on the misrepresentation. Defendants' factual arguments, however misrepresented, do not sustain their burden of proof that Zhejiang Beta Pharma is fraudulently joined in this case. Remand is appropriate.

A. Defendants Have Misrepresented the Applicable Law.

Subparagraph A of defendants' "Legal Argument" in their Reply Memorandum reads, in full, as follows:

> Throughout its Memorandum of Law, Plaintiff avers that the Court must accept his factual allegations as true. Pl's Br. at 7. Plaintiff is wrong. When examining its own subject matter jurisdiction and considering whether to remand the matter to state court, the Court cannot simply accept allegations of fact set forth in the Complaint as true, especially where Beta Pharma and Zhang have presented competent proof that contradicts Plaintiff's allegations. See United

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> Food & Comm'l Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc., 30 F. 3d 298,305 (2d Cir. 1994) (citations and internal quotation marks omitted); Audi of Smithtown, Inc. v. Volkswagen of Am., Inc., 2009 WL 385541, at *3 (E.D.N.Y. Feb. 11, 2009); CMS Volkswagen Holdings, LLC v. Volkswagen Grp. Of Am., Inc., 2013 WL 6409487, at *4 (S.D.N. Y. Dec. 6, 2013)(citing Building and Const. Trades Council of Buffalo, N. Y. and Vicinity v. Downtown Dev., Inc., 448 F. 3d 138, 150 (2d Cir. 2006)) (holding that "[t]he court may look outside the pleadings to determine whether to apply the fraudulent joinder doctrine" and to examine its own subject matter jurisdiction).

Reply Memorandum, Docket Entry 91, at 3 – 4[1]. Defendants' emphatic assertion that plaintiff has applied the "wrong" legal standard is false.

The Second Circuit has repeatedly held that a defendant asserting that plaintiff has fraudulently joined another defendant for the purpose of defeating diversity, bears the burden of proof, and that ". . . . all factual and legal issues must be resolved in favor of the plaintiff." Pampillonia v. RJR Nabisco, Inc., 138 F. 3d. 459, 460-61 (2d Cir. 1998). The Second Circuit reaffirmed this standard in 2004 in Briarpatch Ltd., L.P v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004):

> The doctrine of fraudulent joinder is meant to prevent plaintiffs from joining non-diverse parties in an effort to defeat federal jurisdiction. Under the doctrine, courts overlook the presence of a non-diverse defendant if from the pleadings there is no possibility that the claims against that defendant could be asserted in state court. *See Pampillonia v. RJR Nabisco, Inc.,* 138 F.3d 459, 461 (2d Cir.1998). The defendant bears the heavy burden of proving this circumstance by clear and convincing evidence, with all factual and legal ambiguities resolved in favor of plaintiff. *Id.*

[1] The cases defendants cite do not shift the burden of proving federal jurisdiction to plaintiff. Notably, the United Food case does not involve a claim of fraudulent joinder, but turns on whether the union is an unincorporated association. The Building & Const. Trades opinion, a RCRA case, deals with standing; the quoted language about "fraudulent joinder" does not appear in that opinion.

Indeed, this Court recently applied the Pampillonia standard to remand an improperly removed employment discrimination case in Dieterle v. Rite Aid Pharmacy, No. 3:14-CV-00849-VLB, 2015 WL 1505666, at *3 (D. Conn. Mar. 31, 2015), (Bryant, J.). The Court wrote:

> "The defendant seeking removal bears a heavy burden of proving fraudulent joiner, and all factual and legal issues must be resolved in favor of the plaintiff." *Pampillonia,* 138 F.3d at 461. Moreover, "because this is a jurisdictional inquiry, a court can look beyond the face of the complaint in assessing whether there is any possibility of recovery." *Retirement Program For Employees of the Town Fairfield v. NEPC,* 642 F.Supp.2d 92, 96 (D.Conn.2009).

Id. at *3. The Dieterle opinion also adopts the Second Circuit's strict "legal impossibility" standard for determining whether there is any likelihood, at all, that the nondiverse defendant may be liable to plaintiff under the law of the state from which the case was removed: "any possibility of recovery, even if slim, militates against a finding of fraudulent joinder." Id. At *3 (quoting Nemazee v. Premier, Inc., 232 F. Supp. 2d 172,178 (S.D.N.Y. 2002)).

Additionally, other courts in the District of Connecticut have similarly applied the Pampillonia standard to place the burden of proof properly on the defendants, rejecting claims of fraudulent joinder and remanding the cases improvidently removed. See Read v. Nationwide Mut. Ins. Co., No. CIVA 306CV-00514 JCH, 2006 WL 2621652, at *1 (D. Conn. Sept. 13, 2006), (Hall, J.) (employment case: finding defendant not fraudulently joined, and ordering remand); Oliva v. Bristol-Myers Squibb Co., No. CIVA305CV00486 (JCH), 2005 WL 3455121, at *2 (D. Conn. Dec. 16, 2005), (Hall, J.) (product liability case: finding that the defendant was not fraudulently joined, and ordering remand); Kenneson

v. Johnson & Johnson, Inc., No. 3:14-CV-01184 MPS, 2015 WL 1867768, at *2 (D. Conn. Apr. 23, 2015, Shea, J)(product liability case: finding defendant not fraudulently joined, and ordering remand). In short, defendants' argument that plaintiff has applied the "wrong" legal standard contradicts controlling Second Circuit authority, as applied repeatedly in this District.

B. Defendants' Misrepresentation of Applicable Law was Deliberate, made for the Impermissible Purpose of Attempting to Shift the Burden of Proof to Plaintiff.

Defendants rely on their misrepresentation of controlling law throughout their Reply Memorandum to argue that plaintiff has a duty to "contradict or undermine the competent evidence that Defendants have supplied," Reply Memorandum, Docket Entry 91 at 4, and to argue that plaintiff has failed to meet this burden of proof. Defendants thus contend that plaintiff has failed to offer evidence to overcome the declarations of Clarke and of defendant Zhang, which defendants argue this Court must accept as controlling. In making this argument, however, defendants ignore the Second Circuit's Pampillonia directive placing the burden of proving fraudulent joinder on defendants, in circumstances where " . . . . all factual and legal issues must be resolved in favor of the plaintiff." Pampillonia v. RJR Nabisco, Inc., 138 F. 3d. 459, 460-61 (2d Cir. 1998).

Defendants further impermissibly attempt to shift the burden of proof to plaintiff by arguing that plaintiff's factual and legal submissions are inadequate to overcome other pieces of defendants' "competent evidence." Defendants' argument, however, is predicated on their legally incorrect assertion that plaintiff has a burden of proof. Yet, even as defendants make this argument, they fail to

rebut the positions plaintiff articulated in his principal brief. They quote out of context some language from the Partnership Offering document, Exhibit A to plaintiff's complaint, to assert that the transfer of the Zhejiang Beta Pharma interest to plaintiff had not yet occurred, and therefore Zhejiang Beta Pharma's status as a Sino-Foreign Joint Venture does not matter. See Reply Memorandum, Docket Entry 91 at 6, fn. 2. In so doing, defendants ignore other language in the 2010 Partnership Offering that reads, "Your total ownership of Zhejiang Betapharma (sic) is one percent." The plain meaning of this language is that the ZBP interest vested in plaintiff in 2010. Defendants' language deals with how that 2010 interest will be converted to public stock when the IPO occurs.

Confronted by the Zhejiang Beta Pharma Board Resolution of 2012, defendants retreat from their argument that the Board is a "mere stakeholder." They now concede that as a result of the operation of the Sino-Foreign Joint Venture Law, ". . . . ZJBP's Board may or may not have been a mere stakeholder under those circumstances as alleged by the Shao plaintiffs." Reply Memorandum, Docket Entry 91 at 10. Defendants' prior assertion that Zhejiang Beta Pharma was purely a "mere stakeholder" was the linchpin of their argument that a suit against them was unnecessary. Since they now concede that the Zhejiang Beta Pharma Board may have exercised dominion over its shares, they implicitly recognize that suit against Zhejiang Beta Pharma may be necessary, and, hence, that defendant has not been fraudulently joined.

Defendants assert that different provisions of Chinese corporate law apply, at different times, during the five year history of plaintiff's relationship with

Zhejiang Beta Pharma, depending on whether that entity was a Sino-Foreign Joint Venture or a Joint Stock Company. Because a dispute of fact exists about the date on which plaintiff acquired his interest in ZBP, a dispute exists about which of the Chinese corporation laws is applicable. Yet defendants would have this Court ignore the history of the transaction when considering the merits of plaintiff's claims against Zhejiang Beta Pharma, and resolve the point of Chinese law against plaintiff by making findings about the applicable Chinese law only as it existed as of the date this case was removed. Reply Memorandum, Docket Entry 91 at 6. Their argument ignores the rule of the Pampillonia decision, that "all factual and legal issues [including, presumably, disputed issues of Chinese corporation law] must be resolved in favor of the plaintiff."

To the contrary, this Court is only required to reach the merits of defendants' claims concerning Chinese law if it accepts defendants' initial false proposition, that applicable Second Circuit law imposes a burden of proof on plaintiff to show that its claims against ZBP are viable when defendants assert that ZBP has been fraudulently joined. Contrary to defendants' assertions, plaintiff has no such burden. As the cases from this District hold, the defendants claiming Federal jurisdiction have the burden to prove their entitlement to such jurisdiction, and the burden to prove fraudulent joinder, in circumstances where both factual and legal matters are resolved in favor of the plaintiff.

Because defendants' jurisdictional claim depends on this Court finding that a codefendant has been fraudulently joined, defendants bear the burden of proving that it is legally impossible for plaintiff to recover from that defendant in

state court. See Dieterle v. Rite Aid Pharmacy, 2015 WL 1505666 at *3. As plaintiff argues in his principal brief, at this stage of the proceedings this Court cannot predict the ultimate outcome of plaintiff's case against ZBP, were that case to proceed to judgment in the Connecticut Superior Court. For example, if plaintiff amends his complaint to assert a claim for damages against Zhejiang Beta Pharma, he may obtain judgment and collect from Zhejiang Beta Pharma's assets in the United States. Therefore, plaintiff respectfully submits that this Court cannot conclude as a matter of law that it is "legally impossible" for plaintiff to prevail.

Finally, defendants' claim that plaintiff sued Zhejiang Beta Pharma solely for the purpose of defeating diversity jurisdiction simply does not make real-world good sense. Plaintiff alleges in his Complaint that as part of the Partnership Offering, Exhibit A to the Complaint, defendants Beta Pharma and Zhang transferred 1% of the stock of Zhejiang Beta Pharma to him in 2010. At that time defendant Zhang, then a Connecticut resident, was Vice President and a member of the Board of Directors of Zhejiang Beta Pharma, and Zhejiang Beta Pharma was a private Sino-Foreign Joint Venture, not a public company. As of 2013, this 1% interest was worth some $6 million. In an effort to collect this value, plaintiff sued Beta Pharma, Zhang and Zhejiang Beta Pharma, the three defendants involved in the transaction. Plaintiff sued Zhejiang Beta Pharma in an effort to get money by perfecting his interest in the shares, not as part of some esoteric fraudulent scheme to defeat a removal petition before it was filed.

Indeed, plaintiff never moved to remand this case, thus failing to spring the trap defendants allege that he fraudulently set.

This Court has issued an Order to Show Cause, in contemplation of remanding this case to the Connecticut Superior Court. This Court has wide discretion to consider such portions of the record as it deems appropriate in resolving the jurisdictional question it has posed. Further, this Court does not need to find that Zhejiang Beta Pharma is either "necessary" or "indispensable." All it needs to find, to overcome defendants' claim of fraudulent joinder, is that it may not be legally impossible for plaintiff to proceed against Zhejiang Beta Pharma in state court.

> When asserting fraudulent joinder, the removing defendant bears "a heavy burden." *Id.* at 461.Specifically, "[i]n order to show that naming a non-diverse defendant is a 'fraudulent joinder' effected to defeat diversity, the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court."*Id.; accord Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir.2001). Moreover, in this context, "all factual and legal issues must be resolved in favor of the plaintiff."*Pampillonia,* 138 F.3d at 461.

Audi of Smithtown, Inc. v. Volkswagen of Am., Inc., No. 08CV1773JFBAKT, 2009 WL 385541, at *3 (E.D.N.Y. Feb. 11, 2009). See also Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 150 (2d Cir. 2006)(a court has discretion to look outside the pleadings when determining whether it has subject matter jurisdiction). This Court has discretion to confine its consideration to the pleadings, or to consider such other portions of the record as it appears:

> In analyzing the fraudulent joinder issue, the court is permitted to look beyond the pleadings to resolve this jurisdictional question. *See Building and Const. Trades Council of Bufalo, N.Y. and Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 150 (2d Cir.2006) ("Although this ruling required the district court to look outside the pleadings, a court has discretion to do so when determining whether it has subject matter jurisdiction.") (citing *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir.2002)); *see also Pampillonia*, 138 F.3d at 461-62 (looking to affidavits to determine if plaintiff's complaint alleged a sufficient factual foundation to support claims); *Consol. Fen-Phen Cases*, No. 03-CV-3081 (JG), 2003 WL 22682440, at *3 (E.D.N.Y. Nov. 12, 2003) (stating that, in analyzing fraudulent joinder, "courts can look beyond the pleadings to determine if the pleadings can state a cause of action"); *Arseneault v. Congoleum Corp.*, No. 01-CV-10657 (LMM), 2002 WL 472256, at *6-*7 (S.D.N.Y. Mar. 26, 2002) (considering deposition testimony and other material outside pleadings in order to resolve claim of fraudulent joinder).

Audi of Smithtown, Inc. v. Volkswagen of Am., Inc., No. 08CV1773JFBAKT, 2009 WL 385541, at *3 (E.D.N.Y. Feb. 11, 2009).[2]

For the foregoing reasons, and those appearing in plaintiff's original memorandum, this Court should remand the action to the Connecticut Superior Court.

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[2] Further, if the Court remands this case, that order is not subject to appellate review, either by direct appeal or on writ of mandamus. 28 U.S.C. §1447 (d); Gravitt v. Sw. Bell Tel. Co., 430 U.S. 723, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977); In re WTC Disaster Site, 414 F.3d 352 (2d Cir. 2005).

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2015, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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